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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

BANKFIRST, Plaintiff and Respondent, v. CHRISTO BARDIS et al., Defendants and Appellants.	C059292 (Super.Ct.No. 34200700882841CUCLGDS)

When a borrower defaulted on a secured promissory note for $19,040,000, plaintiff Bankfirst sued defendants Christo Bardis, Sara Bardis, and Rachel Bardis on their personal guaranties. Defendants appeal from right to attach orders and orders for writ of attachment obtained by Bankfirst in its action against them. They contend (1) no attachment is available where the borrower's claim is secured by real property, (2) the aforesaid restriction applies equally to guarantors of the borrower's obligation, and (3) the court erred in ruling that defendants waived this protection.

As we shall explain, the appeal is stayed as to Christo Bardis and Sara Bardis because they have filed a bankruptcy petition, and Rachel Bardis's appeal must be dismissed because it is moot and she lacks standing to appeal.

FACTS

Defendants each unconditionally guaranteed a loan by Bankfirst to Corinthian Communities, Inc. (Corinthian). When Corinthian defaulted on the loan, Bankfirst demanded that defendants honor their guaranties. They refused, and Bankfirst sued them for breach of their guaranties.

Bankfirst also filed applications for right to attach orders and orders for writs of attachment against all three defendants, listing specific property that Bankfirst sought to attach.

The trial court initially denied the applications on the ground that the guarantors were entitled to the same protections as the creditor (Civ. Code, §§ 2809, 2849), and the creditor was protected by a statute preventing an attachment if the creditor's security for the loan is worth more than the amount to be attached. (Code Civ. Proc., § 483.010, subd. (b).) The court concluded that the creditor's note was secured by real property and that, absent evidence the value of the property was less than the amount owed, Bankfirst was not entitled to attach the guarantors' property.

The trial court vacated its tentative ruling after Bankfirst demonstrated that the written guaranties stated in pertinent part: "This guaranty is a primary obligation of Guarantor and Lender shall not be required to first resort for payment of the indebtedness to Borrower or any other person or entity, their properties or estates,

or any security or other rights or remedies whatsoever." The court found that the waiver language was sufficient to waive any rights or defenses that the guarantors may have where the principal's note is secured by real property. The court granted the applications for writs of attachment, ordered Bankfirst to post a $10,000 undertaking for each attachment, and directed Bankfirst to prepare a formal order on the appropriate judicial council form. The court subsequently modified its tentative ruling to exclude one of the properties that Bankfirst sought to attach.

Defendants appealed from these orders. However, on October 15, 2008, Christo Bardis and Sara Bardis filed a Chapter 11 bankruptcy petition in federal district court, which automatically stayed the appeal as to them.[1] (11 U.S.C. § 362; *Valencia v. Rodriguez* (2001) 87 Cal.App.4th 1222, 1226.)

We advised the parties that no further action would be taken in the appeal pending discharge of the stay, and directed them to submit, at least once every six months, a status letter concerning the bankruptcy proceedings.

DISCUSSION

In her status letter, Rachel Bardis states that the bankruptcy action is still pending but that, because she did not file for bankruptcy protection, the automatic stay does not affect Bankfirst's action against her, and her appeal should not be stayed. We agree. (For simplicity and to avoid confusion because all the defendants

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[1] Bankfirst's request for judicial notice of the bankruptcy filing is granted. (Evid. Code, §§ 452, subd. (d), 459.)

have the same last name, we will hereafter refer to Rachel Bardis by her first name.)

Parties who are not (a) creditors of the estate, (b) the trustee of the estate, or (c) the debtor, i.e., the party in bankruptcy, cannot invoke the automatic stay provisions of section 362 of title 11 of the United States Code. (*In re Globe Inv. and Loan Co., Inc.* (9th Cir. 1989) 867 F.2d 556, 559; see also *In re Brooks* (9th Cir. 1989) 871 F.2d 89, 90.)

Bankfirst responds that it voluntarily dismissed its action against Rachel without prejudice on February 4, 2010, which renders her appeal moot because the prejudgment right to attach order has no effect as to her.

Rachel admits that Bankfirst dismissed its action against her. However, despite Bankfirst's concession that this means it cannot pursue any of her property via a prejudgment right to attach order, Rachel disagrees that her appeal is moot. She contends the "entry of a right to attach order is an independently appealable order. [(Code Civ. Proc.,] § 904.1[,subd.] (5).) The RTAO [Right to Attach Order] remains in effect, as do the issued writs. There also remains the issue of whether the original writ was wrongful, determination of which affects entitlement to damages under the bond (which also remains posted)."

Rachel relies on the decision in *United P. Assns. v. Stockton I. P. Co.* (1937) 19 Cal.App.2d 432 (hereafter *United P.*), in which an appeal was taken from an order discharging a writ of attachment, the action was dismissed before the appeal was resolved, and the respondent moved to dismiss the appeal on the ground it was moot.

United P. denied the motion to dismiss the appeal. (*Id.* at p. 433.) One of the conditions for the issuance of the writ of attachment was the filing of an undertaking in the sum of $15,150, and "one of the conditions of [the] undertaking was 'that if the said attachment is discharged on the ground that the plaintiff was not entitled thereto . . . the Plaintiff will pay all damages which the Defendant may have sustained by reason of the attachment, not exceeding the sum specified in the undertaking.'" (*Id.* at p. 433.) Thus, the question of the rights and liabilities of the parties under the undertaking remained the subject of controversy, the solution to which depended on a determination as to whether the trial court correctly or erroneously discharged the attachment. Under the circumstances, *United P.* held that the appeal was not moot. (*Ibid.*)

The present circumstances are quite dissimilar. Rachel fails to demonstrate that Bankfirst's undertaking is subject to the same condition as that in *United P.,* and she does not appeal from an order *discharging* a writ of attachment, which would raise the specter of a wrongful attachment. Nor has she demonstrated that she has met the statutory requirements for a wrongful attachment, one of which is a *levy under a writ of attachment*. (Code Civ. Proc., § 490.010.)[2] Until Bankfirst levies upon Rachel's property

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[2] Code of Civil Procedure section 490.010 states in pertinent part: "A wrongful attachment consists of any of the following: [¶] (a) The levy under a writ of attachment or the service of a temporary protective order in an action in which attachment is not authorized, . . . [¶] (b) The levy under a writ of attachment or the service of a temporary protective order in an action in which the plaintiff does not recover judgment.

under a writ of attachment, there is no issue of liability for wrongful attachment. If Bankfirst has dismissed its action against her without actually attaching any of her property, Rachel's appeal is moot.

In reviewing the parties' claims concerning mootness, we discovered a more significant jurisdictional flaw. The appellate record contains no evidence that a writ of attachment ever issued as to Rachel and/or the property listed in the application for a right to attach order. Indeed, the record discloses that no appealable order of any kind was ever entered with respect to Rachel. The salient facts are as follows:

Bankfirst filed an application for a right to attach order against Rachel, naming specified property it sought to attach, and also filed a similar application against Christo Bardis and Sara Bardis, naming different property. The court granted Bankfirst's applications for a right to attach order and order for writ of attachment, and directed Bankfirst "to prepare a formal order on the judicial council form for the writ of attachment/protective order."

Bankfirst submitted, and the trial court filed, orders entitled, "RIGHT TO ATTACH ORDER AND ORDER FOR ISSUANCE OF WRIT OF ATTACHMENT AFTER HEARING" and "ORDER FOR ISSUANCE OF ADDITIONAL WRIT OF ATTACHMENT." The orders name Christo Bardis and Sara Bardis as

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[¶] (c) The levy under writ of attachment obtained pursuant to Article 3 (commencing with Section 484.510) of Chapter 4 or Chapter 5 (commencing with Section 485.010) on property exempt from attachment except where the plaintiff shows that the plaintiff reasonably believed that the property attached was not exempt from attachment."

defendants; list specific property belonging to them; state that an undertaking of $10,000 is required before a writ shall issue; assert that Bankfirst has filed the requisite undertaking; and say that Bankfirst has a right to attach the property of defendants Christo Bardis and Sara Bardis in the amount of $13,856,039.31. The orders do not name Rachel and do not list the property that was the subject of Bankfirst's application for a right to attach and writ of attachment against Rachel. The appellate record does not contain any formal right to attach order or writ of attachment order naming Rachel or her property.

Consequently, not only is Rachel's appeal moot, she lacks standing to pursue it because she is not aggrieved by the only appealable orders entered in the underlying action. (*Ricketts v. McCormack* (2009) 177 Cal.App.4th 1324, 1336, fn. 12 [only an aggrieved party has standing to appeal]; see generally Code Civ. Proc., § 902 ["[a]ny party aggrieved may appeal in the cases prescribed in this title"].) The requirement of standing is jurisdictional. (*United Investors Life Ins. Co. v. Waddell & Reed, Inc.* (2005) 125 Cal.App.4th 1300, 1304.) Accordingly, we must dismiss her appeal.

DISPOSITION

The appeal by Rachel Bardis is dismissed. The appeal by the remaining parties, Chris Bardis and Sara Bardis, continues to be

stayed. Rachel shall pay Bankfirst's costs on appeal. (Cal. Rules of Court, rule 8.278(a)(5).)

SCOTLAND, P. J.

We concur:

SIMS, J.

ROBIE, J.